NO. 85-656

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1985

Secretary of State of State of
Washington, Ralph Munro,
Appellant,

v.

Socialist Workers Party, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION AND NATIONAL LAWYERS GUILD

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QUESTION PRESENTED

Is the State of Washington's statutory requirement that prohibits candidates for public office from appearing on the general election ballot unless they receive at least 1% of the voter base for that office in the primary election a violation of the First and Fourteenth Amendments to the United States Constitution?

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INTEREST OF AMICI

All parties have consented to the filing of this brief in support of appellees.

The American Civil Liberties Union Foundation ("ACLU") is a national organization comprised of more than 250,000 members. The American Civil Liberties Union of Washington Foundation ("ACLU of Washington") is the Washington affiliate of the ACLU. The ACLU and its affiliates traditionally have been devoted to the protection and enhancement of fundamental liberties and basic civil rights.

The National Lawyers Guild is an organization, founded in 1937, of lawyers, legal workers and law students, with a membership of over 7,050 and chapters throughout the United States, including Seattle, Washington. The

organization is dedicated to openly work to maintain and protect our civil rights and liberties in the face of persistent attacks upon them.

This Court has repeatedly recognized the importance of rights of electoral participation and political association, and has stated that "[t]he impact of candidate eligibility requirements on voters implicates basic constitutional rights." Anderson v. Celebrezze, 460 U.S. 780, 786 (1983) (footnote omitted). The instant controversy deeply implicates these important political and associational interests. Indeed, it is the position of amici that Washington's restrictions on minor parties' access to the general election ballot impermissibly abridges these fundamental rights of political expression and association. Amici

respectfully submit this brief to advance their position to this Court.

STATEMENT OF THE CASE

A. Introduction

Representative democracy rests upon the consent of the governed, and the legitimacy of this "consent" is ensured by permitting the people to freely and fairly choose their political leaders. Alexander Hamilton observed that the essence of representative government is "that the people should choose whom they please to govern them." 2 Elliot's Debates 257. Chief Justice Warren reiterated this basic proposition when he noted that representative democracy "is undermined as much by limiting whom the people can select as by limiting the franchise itself." Powell v. McCormack, 395 U.S. 486, 547 (1969).

Washington's minor party ballot qualification system abridges fundamental constitutional rights to vote,

to associate for political purposes, and to equal protection of the laws. Since the rights burdened by the Washington statute are fundamental, this statute should be strictly scrutinized. The restrictions imposed by the Washington statute are highly suspect not only because they burden First Amendment rights but also because they are intentionally aimed at minor parties.

Washington's statutory scheme significantly burdens protected rights by requiring minor party candidates to validate themselves by obtaining one percent of the vote on the primary ballot, and by mandating that a minor party (but not a major party) must select one candidate before the primary and list only that candidate on the ballot. In effect, the two express

statutory discriminations embodied in Washington's statute between major and minor parties combine to mean that major party adherents have a strong incentive to vote and select their nominee, while minor party voters have no choice between candidates at all and must vote only to validate their party.

By eliminating the minor party's best chance to compete with and gain supporters from the two major parties which dominate the political landscape, the Washington statutory ballot system all but destroys any practical opportunity minor parties have to gain a position on the general election ballot.

The Washington statute serves no compelling state interest, and, in fact, contravenes the only interest identified by appellant, that of preventing voter confusion. Although

preventing voter confusion may be a legitimate state interest, here the lack of any threat to that interest undeniably diminishes its strength. Furthermore, were the risk of voter confusion significant, Washington's statutory framework simply moves that risk from the general to the primary election ballot. In fact, this statutory scheme creates a risk of more, rather than less, voter confusion. The primary ballot is inherently longer than the general election ballot because it contains all of the potential nominees of the major parties, as well as one for each minor party. Since a major party primary candidate is not required to show any prior support and may be placed on the ballot simply at his word, there are often long lists of such candidates.

Thus, Washington fails to protect the voters from any significant risk of confusion, and merely shifts any such risk to the primary ballot, thereby imposing upon minor parties a very real risk that their right to appear on the general election ballot will be denied altogether.

Finally, even if the Washington statute were in fact a means to serve the asserted governmental interest, it is not the least restrictive means to that end, and is far more burdensome in theory and in practice than alternative means.

B. Factual Background

For over 70 years, the State of Washington successfully held elections pursuant to a statutory procedure which permitted minor parties to regularly participate in statewide elections on

the same basis as major parties. Minor party convention nominees were placed directly on the general election ballot. Indeed, in the 21 statewide elections held between 1907 and 1977, there was a minor party candidate for Governor in all but one election. See Appendix A, attached. In the other 20 elections, the number of minor party candidates ranged from one to six candidates per election. Throughout the course of this litigation, appellants have failed to demonstrate any evidence of voter confusion, cluttered ballots, or impairment of the integrity of the election process by frivolous or fraudulent candidacies during the 70-year history of Washington's prior law.

In 1977, the Washington Legislature revised the election procedures for minor parties, with the intention and

effect of adding a substantial new barrier to minor party ballot access. Before 1977, participation in the partisan primary was limited to major parties and was designed as an alternative to nominating candidates through a convention. The 1977 Legislature repealed RCW 29.30.100, which put minor party convention nominees directly on the general election ballot. The amended version of RCW 29.18.020 required the name of the single nominee of the minor party to be placed on the primary ballot, along with the names of all the multiple aspirants for the nomination of each of the two major parties, whose names appear on the ballot as a result of their simple declaration of candidacy. RCW 29.18.030, .110.

Voters, therefore, can choose to participate in the major party primary

selection process, or cast their primary election vote for the single minor party candidate, who has already been selected at the nominating convention. Unless the minor party candidate receives votes of more than one percent of the total number of votes cast in the primary, the party is excluded from the November general election ballot. No explanation of this requirement appears on the ballot. The actual effect of the one percent primary vote requirement barrier is to substantially impair minor party access to the general election ballot.

Almost seven years have passed since Washington's election law was amended. Since the amendments were passed, several minor party candidates have attempted to win a position on the general election ballot, but only one

has succeeded. The 1977 Amendments, as applied, have almost totally excluded minor party candidates from participation in the general election process for statewide offices. Although three well-known political figures have qualified for the general election ballot as "independent" candidates under the new scheme, minor parties have been effectively foreclosed from participation in the general election.

The Socialist Workers Party is not a frivolous or fraudulent party. It has been a nationally organized political party for over 40 years, and before the 1977 Amendments the party's candidates regularly achieved positions on the state's general election ballot.

The lawfully nominated candidate of the Socialist Workers Party in the 1983 Special Senatorial Election was Dean

Peoples. He was nominated by the convention procedure established by Chapter 29.24 RCW, and his nomination was duly certified by the Secretary of State. Because of the 1977 Amendments, his name was placed on the primary ballot instead of the general election ballot. His name appeared along with the names of 18 Democrats and 14 Republicans whose names were placed on the primary ballot simply as a result of their individual declarations of candidacy.

The race for both the Republican and Democratic nominations was hotly contested, and, consequently, the top four candidates (two Democrats and two Republicans) together polled approximately 98% of the vote, the other two percent being divided among the remaining 29 candidates. None of the

remaining candidates, including Socialist Workers Party candidate Dean Peoples, got anywhere near one percent of the vote. The primary contest, therefore, resulted in the candidate of the Socialist Workers Party being barred from the general election ballot altogether. As a result, the general election ballot carried the names of two candidates rather than three, and voters were given no alternative to the Democratic and Republican parties. This condition was a direct result of the statute at issue in this case.

ARGUMENT

I.

WASHINGTON'S MINOR PARTY BALLOT QUALIFICATION SYSTEM ABRIDGES FUNDAMENTAL RIGHTS TO VOTE, TO ASSOCIATE FOR POLITICAL PURPOSES, AND TO EQUAL PROTECTION OF THE LAWS

Restrictions on ballot access are suspect, particularly where, as here, they are explicitly directed at minor parties and burden the constitutional rights to political association and to vote for the candidate of choice. Those rights are not only fundamental in themselves but are "preservative of all other rights," Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886), and thus have deserved the greatest judicial protection. Anderson v. Celebrezze, 460 U.S. 780, 806 (1983); NAACP v. Button, 371 U.S. 415, 438 (1963). Where the burden on those rights is not only substantial

but is disparate, and the disparity is the product of an explicit discrimination against minor parties, then the Equal Protection Clause also requires that the categorization, as well as the burden, be essential to the satisfaction of a compelling state interest, but no more restrictive than necessary. The Washington scheme must be measured against such demanding standards.

A. The Rights Burdened by the Washington Statute Are Fundamental and Require Strict Scrutiny.

"The impact of candidate eligibility requirements on voters implicates basic constitutional rights." Anderson, 460 U.S. at 786 (footnote omitted). Those "distinct fundamental rights" include "'the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless

of political persuasion, to cast votes effectively.'" Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (quoting Williams v. Rhodes, 393 U.S. 23, 30 (1968)). Minor parties play an important role in obtaining the benefits of those constitutional rights. Their campaigns serve to disseminate ideas and sometimes attain office. They have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream. Id. at 186. Provisions that operate to keep minor parties off the ballot significantly burden fundamental rights. Id. at 184.

A "significant interference" with a fundamental right is sufficient to invoke serious constitutional concerns

and strict scrutiny by the courts. Bates v. City of Little Rock, 361 U.S. 516, 523 (1960). When the "vital rights" involved here "are at stake, a State must establish that its classification is necessary to serve a compelling interest." Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. at 184. Accord Williams v. Rhodes, 393 U.S. 23, 31 (1968) (strict scrutiny); American Party of Texas v. White, 415 U.S. 767, 780 (1974) (compelling state interest); Storer v. Brown, 415 U.S. 724, 729 (1974) (compelling state interest).

In Anderson, the Court elaborated on the test applicable to a facially neutral filing date provision that had the effect of hampering independent candidacies. To determine the validity of a challenge to such a provision, one

must (1) identify the scope and nature of the burden on protected rights; (2) weigh the strength of any interests that the restraint is argued to serve; (3) determine whether those interests are sufficiently well served to justify the restriction; and (4) assure that the restraint is precisely designed to burden protected rights no more than necessary. Anderson, 460 U.S. at 789, 806.[1]

B. Restrictions That Not Only Burden First Amendment Rights But Are Intentionally Aimed at Minor Parties Are Highly Suspect.

The provision in Anderson was neutral on its face, and the Court applied only the First Amendment. 460 U.S. at

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[1]The dissent in Anderson did not challenge the applicability of the enunciated test in a case such as this involving state elections but instead contended that the test did not apply to presidential elections, the standards for which are delegated to the states in the Constitution itself. 460 U.S. at 806-08.

786 n.7. In this case, however, the challenged provision is not facially neutral but is explicitly directed only to minor parties and independent candidates. While benefiting the two major parties surely is an understandable instinct of a legislature composed of members of such parties, such a purpose is hardly a legitimate state interest in itself. Id. at 803 n.30. The state's purpose is impermissible if that purpose is to "always, or almost always, exclude" all but the two major parties. American Party of Texas v. White, 415 U.S. at 783.

Courts would prefer to take prophylactic steps to assure that the majoritarian process works as constitutionally designed, rather than intervene in particular substantive decisions. It is therefore fundamental equal

protection doctrine that state action which intentionally alters the political system to make it more difficult for identified groups to press for their concerns and protect their interests is highly suspect. Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. at 184; Williams v. Rhodes, 393 U.S. at 30.

Where the identified groups or "factions" are minor parties that are by definition "not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny." Anderson, 460 U.S. at 793 n.16 (citing United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) and J. Ely, Democracy

and Distrust: A Theory of Judicial Review 73-88 (1980)).

That fear of majoritarian abuse has been realized here, where one of the sponsors of the bill was quite candid about the bill's purpose: minor parties "appear to be taking on the characteristics of a major party and unless maybe some of us get to work they might present a bigger problem." 1977 House Journal 696, Washington State Legislature. Such direct evidence is not necessary where a discrimination is expressed on the face of a statute rather than found only in the statute's impact, Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), but it surely confirms the wisdom of

strict scrutiny of express discriminations in the procedures governing access to and operation of the majoritarian process.

C. The Washington Statutory Scheme Significantly Burdens Protected Rights.

The Court has recognized that the state imposes a significant burden on First Amendment rights when it limits access to the general election ballot to parties that have made some sort of preliminary showing of significant support from potential voters. See, e.g., Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. at 184. The method employed by the states in prior cases was to require the collection of petition signatures equal to a particular percentage of the electorate. Id.

Washington is the only state that requires minor parties to validate themselves by obtaining one percent of the vote on the primary ballot, which historically has been used to choose major party candidates. Washington further provides that minor parties, but not major parties, must select one candidate before the primary and must list only that candidate on the ballot.

Appellant repeatedly and erroneously equates the primary with the general election. Brief of Appellant at 18-19. The original, and in other states still the only, purpose of the primary election is to allow parties to choose which of their two or more candidates will be selected to run in the general election. Thus, the relatively few voters who have chosen to vote in primaries have traditionally been "the

strongest major party adherents." Hudler v. Austin, 419 F. Supp. 1002, 1011 (E.D. Mich. 1976), aff'd sub nom. Allen v. Austin, 430 U.S. 924 (1977). Minor party adherents have traditionally had no reason to vote in primary elections. By selecting as the validation mechanism for minor parties a process whose purpose is to select among party candidates and which generally attracts faithful major party supporters, Washington loaded the dice against validation.[2]

Even without the historical baggage of the primary mechanism, the 1977

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[2]While a state cannot be foreclosed by voter reliance upon its traditions from making necessary changes the Equal Protection Clause may sometimes require, and not just allow, a state to move "one step at a time" (Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489 (1955)), where less careful and incremental change would combine with voter inertia to burden fundamental rights. The 1977 Washington Legislature opted instead for dramatic, and unconstitutional, restructuring.

Amendments created a strong disincentive to participation by minor party adherents, because their parties are statutorily prohibited from choosing among their candidates at the primary election and must instead do so at a convention some time earlier. RCW 29.24.020. In American politics, voters generally turn out in substantial numbers for contested candidate elections, not to validate proposed tax levies or constitutional amendments. American Party of Texas v. White, 415 U.S. at 789 & n.21. Even when passively supported by most of the electorate, such validation elections often fail to meet turnout requirements.

Thus, the two express statutory discriminations between major and minor parties--minor party validation at the primary and only one minor party

candidate at the primary--combine to mean that major party adherents have a strong incentive to vote and select their nominee, while minor party voters have no choice between candidates and must vote only to validate their party.

Of course, many of the voters who would vote for a minor party candidate in the general election are not loyal adherents to the party, and may even be generally faithful to a major party, but are looking for a candidate whose views more closely approximates their own. This Court has recognized that minor party voters often have some affiliation with a major party, Anderson, 460 U.S. at 791 n.12; that "the principal policies of the major parties change to some extent from year to year," Williams v. Rhodes, 393 U.S. at 33; that wavering or fringe major party

supporters will not know a given season's policies until the standard bearers who will design and espouse those policies are selected, Anderson, 460 U.S. at 791; and that such major party "intervening events" will often "serve as the focal point" for a grouping of voters who decided that they are dissatisfied with the major parties. Id. "Indeed, several important third-party candidacies in American history were launched after the two major parties staked out their positions and selected their nominees at national conventions during the summer." Id. at 791-92 (footnote omitted).

By eliminating the minor party's best chance to compete with and gain supporters from the two major parties that admittedly dominate the political system, the Washington scheme all but

destroys the critical role of minor parties "'as an outlet for frustration, often as a creative force and a sort of conscience, [and] as an ideological governor to keep major parties from speeding off into an abyss of mindlessness." Id. at 794 n.17 (quoting from A. Bickel, Reform and Continuity, 79-80 (1971)). The Court in Anderson subsequently adopted Professor Bickel's "perceptive" observation that "'[t]he characteristic American third party, then, consists of a group of people who have tried to exert influence within one of the major parties, have failed, and later decide to work on the outside.'" 460 U.S. at 805 (quoting Bickel, supra, at 87-88 n.11).

The Washington statute forces a weak major party supporter or one who is unsure of the party's path to choose

between selecting between the major party candidates and validating a minor party option that the voter will not care to pursue if the major party selects the correct candidate and path. Most voters will gamble on investing their single votes in the major party race.[3] Further, the

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[3]In the general election, voters have to choose between helping decide between the candidates of the major parties or voting for a minor party. The group of voters who would find themselves positioned on the political spectrum somewhere between the two major parties are not likely voters for minor parties, which are generally found on one end or the other of the spectrum. In the primary, however, the voters facing such a dilemma are those positioned on the spectrum between the edge of one major party and a minor party and would thus be likely minor party voters if there were not a contested race between candidates on different points of the major party's own spectrum. See Anderson, 460 U.S. at 794 n.17. The Washington statute not only makes it more difficult to obtain the validation of those likely voters, but leaves those voters with no attractive option at the general election if the "wrong" candidate wins the major party primary. "[T]he right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." Williams v. Rhodes, 393 U.S. at 31.

statute denies minor parties of the support of those numerous voters who do not participate in primary elections but would have supported the minor party candidate in the general election in light of the candidate selected by the pertinent major party.[4] The Washington statute thus substantially interferes with the very characteristic that this Court and Professor Bickel have identified as creating third-party support.

Moreover, voting in a primary election is an active event that is sufficiently burdensome as to deter many,

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[4]As a result, the Washington statute is more burdensome than a system, such as that analyzed in American Party of Texas v. White, that precludes a voter from voting in the primary and signing a subsequent petition but that allows petitions from the numerous voters who did not make it to the primary polling booth. 415 U.S. at 778. See id. at 789 & n.21 (substantial numbers of voters do not participate in primaries).

and often most, major party supporters from voting to choose their nominee. The parties can ask people to vote but have no way to force them into the poll booths. Signing a petition, on the other hand, is a relatively passive event. Petition gatherers can confront the "voters" and can do so at places that are convenient to the voters since they are already there. The appeal for support can be made right in the "polling place," and wavering supporters will be much more likely to accede to the personal appeal. The large group of people who find it inconvenient to vote on the one particular election day will, on the other hand, be at a convenient spot for signing petitions and being solicited sometime during the petition period, which runs for many days and is not limited to weekdays or

to particular hours of the day, as the one primary day is limited. The signature gatherer likely suffers "no suffocating restrictions whatever upon the free circulation of nominating petitions." Jenness v. Fortson, 403 U.S. 431, 438 (1971).[5] He does not have to worry that the target's attention will be diverted to a hotly contested major party primary race. Indeed, the petition gatherer will probably be able to solicit signatures from people who already plan to or have voted in a

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[5]In Jenness, for example, the validator could sign more than one petition and could also vote in the contested party primary. 403 U.S. at 438-39. Accord Libertarian Party of Florida v. Florida, 710 F.2d 790, 794 (11th Cir. 1983), cert. denied, ____ U.S. ____, 105 S. Ct. 117 (1984); Libertarian Party v. Bond, 764 F.2d 538, 542 (8th Cir. 1985).

major party primary.[6] Thus, appellant errs in assuming that judicial acceptance of certain validation percentages in the petition context necessarily justifies usage of the same or smaller percentages in the primary vote context.

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[6]The Washington primary validation scheme shares one characteristic with the petition mechanisms analyzed in American Party of Texas v. White and Storer v. Brown. In those cases there were prohibitions on signing petitions and voting in the major party primary contest. Even if this were the only critical characteristic, the prohibitions in those two cases were held to be justified by the interest in precluding minor party supporters from voting in and attempting to distort the results of major party primary races. White, 415 U.S. at 786; Storer, 415 U.S. at 733-36. Washington, however, has repeatedly disavowed any such interest. In White, minor parties were required to hold their conventions at the time of the major party primaries but were allowed to continue to collect signatures after that time, if necessary. 415 U.S. at 778. In addition, Storer was undermined by the decision in Anderson. See 460 U.S. at 816-17. (Rehnquist, J., with White, Powell, & O'Connor, JJ., dissenting).

The difficulty in obtaining primary votes, as opposed to petitions or even general election votes, is shown by the history of minor party performance in Washington before and after the statute's enactment. Prior to 1977, when minor parties routinely appeared on the general election ballot, they quite often obtained more, often much more, than one percent of the votes. See Appendix A. Since 1977, when the same parties have appeared instead on the primary ballot, they have been far less successful in garnering support. Appellant made no effort to establish below that this disparity was due to anything but the obstacles created by using the primary as the validation mechanism.

Actual voting patterns must also be examined to determine the real impact

of the Washington statute as a whole in the context it was designed to serve. See Storer v. Brown, 415 U.S. at 742; Mandel v. Bradley, 432 U.S. 173, 177 (1977). The patterns dramatically establish that the scheme directly and substantially reduced minor party support, and made validation an "impractical alternative" for diligent, previously successful parties, and thus interfered in fact with the constitutional rights at issue. Storer v. Brown, 415 U.S. at 745-46.

Appellant's brief presents various tables that purport to show minor party representation in primary and general elections before and after the 1977 Amendments. Brief of Appellant at 7. The tables are misleading because they combine both statewide and local elections. Local elections are largely

irrelevant because the 1977 Amendments were only challenged and declared unconstitutional as applied to statewide elections. Indeed, the state presented no information relating to local elections to the courts below. Therefore, this Court should ignore information relating to local contests. Jenkins v. Anderson, 447 U.S. 231, 234 n.1 (1980).

With respect to statewide elections, which are at issue in this suit, since 1977 there have been only twelve minor party candidates in statewide primary elections. All but one of them was eliminated from the general election ballot. By contrast, between 1968 and 1976 40 minor party candidates appeared on the general election ballot.

This Court has held that "to comply with the First and Fourteenth Amendments

the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot." Storer v. Brown, 415 U.S. at 746. In no reported case has a ballot restriction been upheld where its practical effect was to substantially eliminate minor party representation on the ballot.

The effects of the primary election validation provision are more fully set forth in the opinion of the Ninth Circuit and in the Appellee's brief.

The same impermissible exclusion of minor parties that has occurred in Washington was also found in the only other state which imposed a primary system for minor party validation. In 1976 Michigan enacted a requirement that minor parties obtain only .3 percent of the primary vote. Although the

facial validity of the statute was upheld by a three-judge district court and this Court, Hudler v. Austin, 419 F. Supp. 1002, supra,[7] a few years of experience with the statute convinced the Michigan Supreme Court that the burden was substantial, unjustified, and in violation of the United States Constitution. Socialist Workers Party v. Secretary of State, 412 Mich. 571, 317 N.W.2d 1 (1982).

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[7]This Court's summary affirmance in Hudler is not dispositive.

This Court has "often recognized that the precedential effect of a summary affirmance extends no further than 'the precise issues presented and necessarily decided by those actions.'" Anderson, 460 U.S. at 784 n.5 (quoting Mandel v. Bradley, 432 U.S. at 176). Accord Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. at 180-83; Socialist Workers Party v. Secretary of State, 412 Mich. 571, 317 N.W.2d 1, 3 & n.10 (1982). In Hudler, the district court did not examine the statute as applied and compared petition and primary percentage requirements without apparent awareness of the reasons the primary mechanism would prove to be far more burdensome in practice. See 419 F. Supp. at 1011.

The Michigan Supreme Court found that the effect of the statute was heightened because the primary mechanism eliminated ideological alternatives before the electorate could know the two major party candidates and their issues. 317 N.W.2d at 6-7. A primary validation requirement less than one-third as stringent as Washington's thus was struck down on the basis of its actual impact and principles developed in cases in which a petition system with numerical percentages up 15 times greater were upheld.

The demand for any showing of significant support in an election designed as a contest for candidates of the major parties imposes a disparate burden on the voting and political associa'ion rights of minor parties that is severe in theory and in

practice. In these circumstances, the first part of the Anderson test, the burden of the restriction imposed, requires that the second, or justification, part be strongly satisfied by the state. That did not happen in this case.

II.

THE WASHINGTON SCHEME IS UNNECESSARY TO THE SATISFACTION OF ANY COMPELLING STATE INTEREST AND IN FACT CONTRAVENES THE INTEREST IDENTIFIED BY APPELLANT

Appellant identifies only one interest served by the Washington statute, and that sole justification is put forth rather timidly. Appellant contends that Washington has the right to require that minority parties demonstrate a modicum of support so as to eliminate a few marginal parties whose appearance on the ballot might one day create a list so long as to confuse

voters. The line between a policy that some minor parties are too many and that all minor parties are too many is a fine one, but is of great constitutional significance. Washington finds itself far to the wrong side of that line.

In the first place, there is no evidence in the record of problems relating to voter confusion before the 1977 Amendments were passed. Prior to 1976, there were no more than six minor party candidates for the statewide offices that the parties and courts below focused on. Appellant argues that twelve minor parties qualified and appeared in the 1976 election. Brief of Appellant at 8. However, these twelve parties did not appear in the same statewide race. There was no suggestion that Washington's voting

machines could not handle the names or that the major party candidates who interest most voters could get lost in the shuffle.

In assessing the constitutionality of a ballot restriction, Anderson holds that the strength and legitimacy of the state's interest must be taken into account. 460 U.S. at 789. Although preventing voter confusion may be a legitimate state interest, the lack of any threat to that state interest undeniably diminishes its strength. This was not a situation in which a dozen or more unknown candidates were causing a loss of focus on more realistic candidates. Compare Lubin v. Panish, 415 U.S. 709, 715-16 (1974) (twelve minor candidates might be too many) with Williams v. Rhodes, 393 U.S.

at 47 (Harlan, J., concurring) (eight is not too many).

Where a constitutionally burdensome statute is directed at only a hypothetical evil, one which has not in fact occurred in the state which enacted the statute, there is reason to believe that the evil may be a post-enactment rationalization created for litigation. Beyond that, the fact that the evil had not come to pass during many years under a system that does not burden constitutional rights suggests that the new scheme is not a necessary or less restrictive alternative.

Moreover, even if the risk of confusion were a significant problem under the prior system, the 1977 Amendments fail to solve the problem. Instead, the new scheme simply moved that risk to the primary ballot, where it is

more, not less, of a problem. The primary ballot is inherently longer because it contains all of the potential nominees of the major parties, not just one for each. Because a candidate for a major party primary need not make any prior showing of support, there are often long lists of such candidates. In 1983, for example, there were 32 primary candidates for the senatorial nomination of the two major parties. Thus, the Washington statute fails to protect voters from any significant risk of confusion. Instead, it merely shifts any such risk to the crowded primary ballot, thereby imposing upon minor parties a very real risk that their right to appear on the general election ballot will be denied.

In Socialist Workers Party v. Secretary of State, the Michigan

Supreme Court found that a .3 percent primary vote validation requirement "is not necessary for, does not achieve, and is not even rationally related to the claimed state interests." 317 N.W.2d at 9. Where, as here, the means chosen does not serve the enunciated state interest, but does deny minor party adherents their right to vote and to associate politically in an effective way, the statute must fall on equal protection as well as speech and association grounds.

Even if the Washington statute were to serve the asserted governmental interest, it is not an essential means to that end and is far more burdensome, in theory and in practice, than alternative means. Other states have found ways to reasonably regulate access to the general election ballot without

adopting Washington's unique primary validation system which burdens First Amendment rights and imposes a disparate burden on minor parties. As the Court recently noted in exactly this context, "'[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'" Anderson, 460 U.S. at 806 (quoting NAACP v. Button, 371 U.S. at 438).

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals.

RESPECTFULLY SUBMITTED,

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APPENDIX A

APPENDIX A*

CANDIDATES FOR GOVERNOR
Washington State

Name	Party	Vote	Source
1896			
P.C. Sullivan	Republican	38,154	1
John R. Roger	Peoples Party	50,849	
R.E. Dunlap	Prohibition	2,542	
1900			
J.M. Frink	Republican	49,860	2
John R. Rogers	Democratic	52,049	
R.E. Dunlap	Prohibition	2,103	
William McCormick	Socialist Labor	843	
W.C. Randolph	Social Democratic	1,670	
1904			
Albert Mead	Republican	74,278	3
George Turner	Democratic	59,119	
William McCormick	Socialist Labor	1,070	
D. Burgess	Socialist	7,420	
Ambrosh Henry Sherwood	Prohibition	2,782	
1908			
Samuel G. Cosgrove	Republican	110,190	3
John Pattison	Democratic	58,126	
A.S. Caton	Prohibition	3,514	
George Boomer	Socialist	4,311	
1912			
M.E. Hay	Republican	96,629	4
Ernest Lister	Democratic	97,251	
Anna M. Maley	Socialist	37,155	
Abraham L. Brearcliff	Socialist Labor	1,369	
George F. Stivers	Prohibition	8,163	
Robert T. Hodge	Progressive	77,792	
1916			
Henry McBride	Republican	167,809	5
Ernest Lister	Democratic	181,645	
James E. Bradford	Progressive	2,894	

*Submitted as Appendix A to Brief of Appellants, Socialist Workers Party, in the Ninth Circuit Court of Appeals.

1920			
Louis F. Hart	Republican	210,662	6
W.W. Black	Democratic	66,079	
David Burgess	Socialist Labor	1,296	
Robert Bridges	Farmer-Labor	121,371	
1924			
Roland H. Hartley	Republican	220,162	7
Ben F. Hill	Democrat	126,447	
J.R. Oman	Farmer-Labor	40,073	
David Burgess	Socialist Labor	770	
Emil Hermann	Socialist	898	
William Gilmore	State Party	1,954	
1928			
Roland H. Hartley	Republican	281,991	8
Scott Bullit	Democrat	214,334	
James F. Skark	Socialist Labor	3,343	
Walter Price	Socialist	1,262	
Aaron Fyslerman	Workers Party	698	
1932			
John A. Gellatly	Republican	207,494	9
Clarence D. Martin	Democrat	353,215	
John F. McKay	Socialist	9,987	
Maslen Meade	Independent	378	
Edward Kriz	Socialist Labor	449	
L.C. Hicks	Liberty	47,710	
Fred E. Walker	Communist	2,532	
1936			
Clarence Martin	Democrat	466,550	10
Roland H. Hartley	Republican	189,141	
John F. McKay	Socialist	4,221	
Eugene Solie	Socialist Labor	466	
O.M. Nelson	Union	6,349	
Harold P. Brockway	Communist	1,939	
William M. Bouck	Farmer-Labor Commonwealth	1,994	
Malcolm M. Moore	Christian	1,947	
1940			
C.C. Dill	Democrat	386,706	10
Arthur B. Langlie	Republican	392,522	
P.J. Ater	Socialist Labor	426	
John Brockway	Communist	1,674	
1944			
Mon C. Wallgren	Democrat		3
Arthur B. Langlie	Republican		

Henry K.C. Gusey	Socialist Labor		
Allen Emmersen	Progressive		
1948			
Mon C. Wallgren	Democrat	417,035	11
Arthur B. Langlie	Republican	445,958	
Russell H. Fluent	Progressive	19,224	
Henry Killman	Socialist Labor	780	
Daniel Roberts	Socialist Workers	144	
1952			
Arthur B. Langlie	Republican	567,675	12
Hugh B. Mitchell	Democrat	510,657	
1956			
Emmett T. Anderson	Republican	508,122	13
Albert D. Rosellini	Democrat	616,987	-
Henry Killman	Socialist Labor	4,163	
1960			
Lloyd Andrews	Republican	594,122	13
Albert D. Rosellini	Democrat	611,987	
Henry Killman	Socialist Labor	8,647	
Jack Wright	Socialist Workers	992	
1964			
Daniel J. Evans	Republican	697,256	14
Albert D. Rosellini	Democrat	548,692	
Henry Killman	Socialist Labor	4,326	
1968			
John J. O'Connell	Democrat	560,262	14
Daniel J. Evans	Republican	692,378	
Ken Chriswell	Conservative	11,602	
Henry Killman	Socialist Labor	1,113	
1972			
Rosellini	Democrat	630,613	14
Evans	Republican	747,825	
Gould	Taxpayer$	86,843	
Killman	Socialist Labor	2,709	
David	Socialist Workers	4,552	
1976			
John D. Spellman	Republican	687,039	15
Dixy Lee Ray	Democrat	821,797	
Henry Killman	Socialist Labor	4,137	
Art Manning	American Independent	12,406	
Evelyn Olafson	U.S. Labor	1,364	
Red Kelly	O.W.L.	12,400	

Patricia Bethard	Socialist Workers	3,106	
Maurice Woodrow Willey, Jr.	Libertarian	4,133	
1980			
John Spellman	Republican	981,083	16
McDermott	Democrat	749,813	

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9 Washington State Abstract of Votes 1932, 1934

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13 State of Washington Official Abstract of Votes State General Election 1954-62

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16 State of Washington, Canvass of the Returns of the State of General Election 1980